FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 1 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

Nos. 23 and 24

CHICAGO TITLE AND TRUST COMPANY, AS SUCCESSOR TRUSTEE, UNDER TRUST DEED RECORDED AS DOCUMENT NO. 10325493,

Petitioner,

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION,

Respondent.

BRIEF FOR PETITIONER.

SILAS H. STRAWN,
FRANK H. TOWNER,
CHARLES J. CALDERINI,
GEORGE W. OTT,
Attorneys for Petitioner.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

INDEX.

	PAGE
Reference to official report of opinions of the lower courts	2
Statement as to jurisdiction	2
Statement of the case	3
Specification of errors	7
Summary of Argument	8
Argument:	
I. Respondent, a dissolved corporation, had no capacity to file a petition for corporate reorganization under Section 77B of the Bankruptcy Act after the expiration of the two-year period allowed by the law of the state of its creation for the winding up of its affairs	10
II. The Bankruptcy Court had no jurisdiction because respondent had no property which could be the subject of reorganization under Section 77B and had no corporate capacity to acquire such property	35
Conclusion	40
Appendix	41

CASES CITED.

Allison v. White, 285 Ill. 311 36
American Exchange Bank v. Mitchell, 179 Ill. App. 612, 615 14
Austin v. Thomas, 78 F. (2d) 602 (C. C. A. 6th Cir.) 33, 34
A. J. Bates Co. v. United States, 3 Fed. Supp. 245, 248 ..... 17, 37, 38
Capital Endowment Co. v. Kroeger, 86 F. (2d) 976 (C. C. A. 6th Cir.) 35
Chicago Board of Trade v. Johnson, 264 U. S. 1, 10 36
City Bank Co. v. Irving Trust Co., 299 U. S. 433, 438 23
City Insurance Company v. Commercial Bank, 68 Ill. 348 14
Commerce Vault Co. v. Barrett, 222 Ill. 169, 175 37
Consolidated Coal Co. v. Flynn Coal Co., 274 Ill. App. 405 16
Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981 (C. C. A. 3rd Cir.) 33, 34
Duffield v. Duffield, 268 Ill. 29, 38 38
Dukes v. Harrison & Reidy, 270 Ill. App. 372 15
Duparquet v. Evans, 297 U. S. 216 26
Ewen v. American Fidelity Company, 261 U. S. 322 19
Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667 11
Gulf Lines R. R. v. Goleonda Ry., 290 Ill. 384, 392 36
Hammond v. Lyon Realty Co., 59 F. (2d) 592 (C. C. A. 4th Cir.) 33, 34
Head v. Providence Insurance Co., 2 Cranch 127, 167 11
Hopkins Federal Savings & Loan Association v. Cleary, 296 U. S. 315 28

International Shoe Co. v. Pincus, 278 U. S. 261..... 26
Life Association of America v. Fassett, 102 Ill. 315, 325 .....14, 17, 19
Louisville Bank v. Radford, 295 U. S. 555..... 38
Lowmon, In re, 79 F. (2d) 887 (C. C. A. 7th Cir.)..... 38
McCormick v. Market Bank, 165 U. S. 538, 550..... 11
Mining Co., et al. v. Mining Co., 116 Ill. 170, 174..... 36
Mumma v. The Potomac Company, 33 U. S. 281..... 10
Munger Vehicle Tire Co., In re, 159 Fed. 901 (C. C. A. 2nd Cir.) 32
Oklahoma Gas Co. v. Oklahoma, 273 U. S. 257..... 11
Old Fort Improvement Co. v. Lea, 89 Fed. (2d) 286 (C. C. A. 4th Cir.).....32, 33, 34
Oregon Railway Co. v. Oregonian Ry. Co., 130 U. S. 1, 20 11
Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407 (C. C. A. 5th Cir.).....33, 34
Scovill v. Thayer, 105 U. S. 143, 148..... 11
Singer & Talcott Co. v. Hutchinson, 176 Ill. 48.....18, 19
Stellwagen v. Clum, 245 U. S. 605, 613..... 26
Straton v. New, 283 U. S. 318..... 27
Sutherland v. Long, 273 Ill. 309..... 36
211 East Delaware Place Bldg. Corporation, In re, 76 F. (2d) 834 (C. C. A. 7th Cir.).....30, 31, 32
211 East Delaware Place Bldg. Corporation, 14 Fed. Supp. 96 (D. C. N. D. Ill.).....30, 31, 32
Vassar Foundry Co., In re, 293 Fed. 248..... 29
Vassar Foundry Co. v. The Whiting Corporation, 2 F. (2d) 240 .....28, 29, 30, 32
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28..... 30

White Mountain Paper Co. v. Morse & Co., 127 Fed. 643 (C. C. A. 1st Cir.) 33, 34
Wilmington Water Power Co. v. Evans, 166 Ill. 548 37
Charles A. Zahn Co. v. United States, 6 Fed. Supp. 317 17

STATUTES CITED.

Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 6.. 12
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 14 ..... 5, 14, 15, 41
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 76 12
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 79 ..... 5, 15, 41
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 118 12
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 123 12
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Section 196 13
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Section 16 ..... 4, 41
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Section 18 ..... 4, 41
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Section 20 ..... 4, 42
Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Section 31 ..... 5, 36, 42
Ill. State Bar Ass'n. Ill. Rev. Stat. 1937 (Business Corporation Act) Chap. 32 14
Section 77B of the Bankruptcy Act as amended, 48 Stat. at L. 912, as amended, 11 U. S. C. A. Section 207 ..... 21-23, 35, 37

Section 1 of the Bankruptcy Act, 11 U. S. C. Section 1 21

Section 3 of the Bankruptcy Act, 11 U. S. C. Section 21 33

Section 4 of the Bankruptcy Act, 11 U. S. C. Section 22 21

Section 44 of the Bankruptcy Act, 11 U. S. C. Section 72 37

Section 70 of the Bankruptcy Act, 11 U. S. C. Section 110 37

TEXTBOOKS CITED.

Fletcher, Cyclopedia of Corporations (Perm. Ed. 1933), Vol. 16, Chap. 65, Sec. 8137, p. 940..... 37

CONGRESSIONAL REPORT CITED.

House Report No. 194, 73d Congress, 1st Session to accompany H. R. (P. 1)..... 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 23 AND No. 24.

CHICAGO TITLE AND TRUST COMPANY, AS SUCCESSOR TRUSTEE UNDER THE TRUST DEED RECORDED AS DOCUMENT No. 10325493,

Petitioner.

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION,

Respondent.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

These cases come to this Court on writs of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to review decrees of that Court affirming decrees entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding instituted by respondent for its corporate reorganization under Section 77B of the Bankruptcy Act. The proceeding was initiated by the voluntary petition of respondent, an Illinois corporation, filed more than four years after it had been dissolved by judicial decree in a suit filed by

the Attorney General of the State of Illinois, and more than two years after the expiration of the time allowed by Illinois statute for winding up its affairs.

The District Court assumed jurisdiction over respondent and over real estate which it claimed to own, for the purpose of reorganization under Section 77B; and to that end restrained petitioner from the further prosecution of proceedings in the courts of Illinois to foreclose the lien of a first mortgage on the real estate, and directed the receiver in the foreclosure proceedings to turn over possession of the real estate to the temporary trustee which it appointed. The jurisdiction of the District Court to proceed under the voluntary petition of the respondent is challenged by petitioner.

1. Reference to Official Report of Opinions of Lower Courts.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals is officially reported at 86 F. (2d) 667, and is printed in full in the record (R. 107, *et seq.*). The opinion was delivered by District Judge Lindley, with whom Circuit Judge Sparks concurred. District Judge Briggle dissented.

2. Statement as to Jurisdiction.

The decrees of the Court of Appeals were entered on November 30, 1936 (R. 113, 114). Petitioner's petition for rehearing in the Court of Appeals was filed on December 19, 1936 (R. 114), and was denied on January 7, 1917 (R. 115). The cases come to this Court on petition for certiorari filed herein on April 7, 1937, this petition having been granted by orders entered in this Court on May 17, 1937 (R. 120).

3. Statement of the Case.

On April 10, 1929, respondent, Forty-one Thirty-six Wilcox Building Corporation, was organized as a corporation under the laws of the State of Illinois for the sole purpose of owning and operating one building and the site therefor (R. 40). Thereafter it acquired title to certain real estate and the building thereon, located at 4136 Wilcox Avenue in the City of Chicago, Illinois. At the time respondent acquired the property it was subject to the lien of a first mortgage securing the payment of bonds aggregating $95,000, which respondent agreed to pay (R. 19). On December 26, 1929, respondent further encumbered the property with a junior mortgage securing the payment of its notes for $15,000 (R. 108). These premises are the *only* property ever owned or possessed by respondent, and petitioner is now the trustee under both mortgages (R. 71).

On May 22, 1931, in a suit brought by the State of Illinois in the Superior Court of Cook County, Illinois, a decree was entered in which the Court found that respondent and its board of directors had ceased to transact business as a corporation; had discontinued the exercise of corporate functions; and had failed to comply with the General Corporation Act of the state relative to the filing of annual reports and payment of license fees or franchise taxes. Upon the basis of these findings, the Court decreed the dissolution of respondent as a corporation, and declared its charter and authority as such to be null and void (R. 51, *et seq.*). No appeal was taken from this decree, and respondent has made no attempt to have it set aside or to have its corporate status and powers restored by the State of Illinois.

On July 10, 1931, a decree was entered against respondent in the Circuit Court of Cook County foreclosing certain mechanics' liens on its property, subject only to the

lien of the first mortgage, and ordering a sale of the property if the mechanics' lien claims were not paid within three days (R. 56, *et seq.*). The claims were not paid, and pursuant to the decree the property was sold on August 5, 1931, and a master's certificate of sale was issued to the purchasers, entitling the holder thereof to a deed to the premises upon the expiration of the period of redemption (R. 65, 66; Smith-Hurd Rev. Stat. 1929, Ch. 77, Sec. 16; see App. p. 41). Respondent's right to redeem the property expired on August 5, 1932, and the right of its creditors to redeem expired on November 5, 1932 (Smith-Hurd Rev. Stat. Ill. 1929, Ch. 77, Sec. 18, 20; see App. pp. 41, 42). Neither respondent nor any of its creditors redeemed the property within the period allowed by the Illinois statute.

On October 24, 1931, the Madison & Kedzie State Bank, the predecessor of petitioner, as trustee under the first mortgage upon the property, instituted suit in the Superior Court of Cook County, Illinois, to foreclose the lien of its mortgage, and on November 10, 1931, the trustee under the junior mortgage also commenced suit in the same court to foreclose the lien of its mortgage (R. 71, 72). A receiver appointed in these foreclosure suits took possession of the property, and was in possession at the time when this case was heard in the District Court (R. 33, 71). Respondent was made a party to and appeared in both suits by its attorney; it offered no defense, but its attorney received and checked accounts and reports from time to time served upon parties of record by the receiver (R. 31, 73). During the pendency of the foreclosure suits respondent had nothing to do with the property (R. 27, 28), and consequently transacted no business.

The statutes of Illinois provided for a two-year period following respondent's dissolution as a corporation and the cancellation of its charter, during which respondent's

corporate existence was continued for the purpose of winding up its affairs (Smith-Hurd. Ill. Rev. Stat. 1929, Chap. 32, Secs. 14, 79; see App. p. 41). This period of two years expired on May 22, 1933. At that time respondent had no property of any kind, except the possibility that the certificate of the sale of the Wilcox Avenue property might become void if the holder failed to take out a deed within five years of the expiration of the period of redemption (Smith-Hurd Ill. Rev. Stat. Chap. 77, Sec. 31; App. p. 42)—a possibility which was, in any event, subject to the lien of the mortgages and the suits then being prosecuted for the foreclosure thereof.

In May, 1935, one Willens and his lawyer, Mitchell Edelson, conceived a plan for the reorganization of respondent under Section 77B of the Federal Bankruptcy Act (R. 34, 35). Pursuant to this plan, Mrs. Fay Fischel, her father, Hyman Schulman, and her brother, Sam Schulman, the three persons who now claim to own all the stock of respondent, acquired that stock from the persons who then owned it. Stockholders' and directors' meetings were held in May, 1935, for the purpose of electing officers and directors (R. 24) and authorizing the filing of a petition for the reorganization of respondent under Section 77B of the Bankruptcy Act (R. 31). One Myron Alexander, a friend of Edelson's (R. 54), then acquired and assigned to the respondent the certificate of sale issued on the foreclosure of the mechanics' liens (R. 35, Debtor's Ex. 3, R. 46; Debtor's Ex. 5, R. 48; Debtor's Ex. 7, R. 50), the Schulmans having refused to go on with the matter unless this was done (R. 35).

One June 13, 1935, respondent filed its petition for reorganization under Section 77B of the Bankruptcy Act (R. 2, *et seq.*). Thereafter, on June 21, 1935, after notice to all parties, including counsel for petitioner (R. 6), it filed

its petition praying that the receiver appointed in the foreclosure suits in the state court be directed to turn over to it the premises in his possession and that the complainants in those suits be restrained from the further prosecution thereof (R. 7, 8). Petitioner filed an answer to these petitions (R. 9, *et seq.*), denying that respondent was a corporation or that the bankruptcy petition was filed in good faith, and setting up the corporate dissolution of petitioner, the sale of its property, the foreclosure proceedings pending in the State court and the claims of petitioner therein.

These petitions and the answer of petitioner were referred to a Special Master, who held hearings and reported in effect that respondent's bankruptcy petition had been filed in good faith; that it had legal capacity to file the petition under Section 77B, and that its petition was sufficient to confer upon the court jurisdiction over respondent and the premises in question (R. 70, *et seq.*). Petitioner filed exceptions to this report, alleging, among other things, the errors of the Special Master in finding that respondent had corporate capacity to file the petition and that it had filed the petition in good faith, and setting up that the action of the Special Master was a denial of full faith and credit to the laws of Illinois and the decree of the State court (R. 77, *et seq.*). The District Court overruled petitioner's exceptions and confirmed the Master's report (R. 79), and thereafter appointed a Temporary Trustee for respondent; required the state court receiver to deliver possession of the premises to the Trustee; and restrained petitioner from further prosecution of its foreclosure proceedings (R. 80, 83).

Petitioner then prayed and was allowed an appeal in the District Court (R. 87, 91), and was also allowed an appeal by the Circuit Court of Appeals (R. 102), posting a bond for $5,000 to stay proceedings during the appeal (R. 91, 92). The appeals were then consolidated in the Court of Appeals (R. 102). The Court of Appeals (R. 113) affirmed

the order of the District Court, holding (R. 107, *et seq.*) that the laws of Illinois, the proceedings thereunder in the Illinois courts and the lapse of time were ineffective to disqualify respondent from proceeding under Section 77B of the Bankruptcy Act. Judge Briggle dissented from this conclusion (R. 112). Petitioner's petition for rehearing in the Court of Appeals, filed December 19, 1936 (R. 114), was denied on January 7, 1937 (R. 115). On April 7, 1937, petitioner filed in this Court its petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit, which petition was granted by orders entered by this Court on May 17, 1937 (R. 120).

4. Specification of Errors.

Petitioner makes the following specification of errors:

(1) The Court of Appeals erred in holding that respondent was a corporation eligible to file a petition for reorganization under Section 77B of the Bankruptcy Act.

(2) The Court of Appeals erred in holding that respondent had a property interest, or was legally competent to acquire a property interest, sufficient to enable a bankruptcy court to exercise jurisdiction under Section 77B of the Bankruptcy Act.

(3) The Court of Appeals erred in holding that the decree dissolving respondent, and the statutes of the State of Illinois limiting its corporate existence thereafter, were suspended and superseded by the Bankruptcy Act and the proceedings had thereunder.

(4) The Court of Appeals erred in holding that the statutes of the State of Illinois and the orders and decrees of the Illinois courts were limitations upon or operated to defeat the working of the Bankruptcy Act.

(5) The Court of Appeals erred in holding that the

foreclosure proceedings pending in the state court were, in effect, liquidation proceedings, and that by reason thereof respondent had a continuing right to file a petition under Section 77B of the Bankruptcy Act.

(6) The Court of Appeals erred in holding that the construction placed by it upon the Bankruptcy Act and its exercise in this case was not a violation of petitioner's rights under the Fifth and Tenth Amendments to the Constitution of the United States.

5. Summary of Argument.

(1) The law of the State of Illinois must be held to be conclusive on the question of respondent's corporate existence and capacity. This is the rule consistently followed and approved by this and other courts. If it be applied in the case at bar, it follows that under the law of Illinois, respondent's corporate life and entity had been wholly terminated. Everything required to be done by the Illinois statute to terminate respondent's existence was done, and respondent has made no effort to have its former corporate status restored. For two years after its dissolution respondent's activities were limited as provided by Illinois law, and after the expiration of that period, it had no corporate capacity to file a petition under Section 77B of the Bankruptcy Act, or to institute any other litigation of any character.

(2) The language of the Bankruptcy Act, and particularly of Section 77B thereof, contemplates that a corporation filing a petition thereunder shall enjoy an existence under the statutes of the state of its creation. The law does not provide for the filing of such a petition by a corporation which has ceased to exist. By virtue of the dissolution proceedings under the Illinois law, respondent's entity as a corporation was terminated; consequently, it had

no right, under the language of the Bankruptcy Act, to file the petition here in issue.

(3) There is no conflict between the statutes of Illinois relating to the dissolution of Illinois corporations and the Bankruptcy Act. Nor is there such a conflict between the decree entered by the Illinois court dissolving respondent and the Bankruptcy Act. The Illinois law under which respondent was dissolved does not purport to be, and is not, such an insolvency law. It relates only to the formation of corporations and to their dissolution for the causes specified therein. Nor were the mortgage foreclosure proceedings, pending in the state court, proceedings having for their object the liquidation of respondent's property. They were no more than proceedings to enforce a mortgage lien upon specific property of respondent, and did not contemplate any procedure such as would be appropriate in the liquidation of respondent's assets. The effect given to Section 77B of the Bankruptcy Act by the opinion of the Circuit Court of Appeals creates serious doubt as to the constitutionality of that Section.

(4) The decision of the Court of Appeals in the case at bar finds no support in any reported decision and is in direct conflict with a decision of the Court of Appeals for the Sixth Circuit. In other cases in which the principle has been discussed, the opinions of the various courts support the position here advanced by petitioner.

(5) Section 77B of the Bankruptcy Act contemplates the possession by a petitioner thereunder of property which can be subjected to the processes of reorganization. In this respect it differs from the ordinary bankruptcy proceeding which has for its sole object the discharge of an insolvent debtor from his debts. At the time the petition herein was filed by respondent, it had no property capable of management, operation or reorganization, and by virtue

of its dissolution under the laws of Illinois it had been rendered incapable of acquiring or holding such property. Consequently, there was no jurisdictional *res* upon which the bankruptcy court could operate.

I.

RESPONDENT, A DISSOLVED CORPORATION, HAD NO CAPACITY TO FILE A PETITION FOR CORPORATE REORGANIZATION UNDER SECTION 77B OF THE BANKRUPTCY ACT AFTER THE EXPIRATION OF THE TWO-YEAR PERIOD ALLOWED BY THE LAW OF THE STATE OF ITS CREATION FOR THE WINDING UP OF ITS AFFAIRS.

(a) *Respondent's existence and its corporate capacity to act must be determined under the law of the State of Illinois. Under that law, the decree of dissolution entered by the Illinois court effectively terminated respondent's corporate existence, except as that existence was continued by the Illinois statutes for a period of two years for the purpose only of collecting debts due it, selling and conveying its property and effects, and prosecuting and defending suits at law and in equity in its corporate name.*

It cannot be doubted that the law of Illinois controls in determining whether respondent had legal capacity to do what it has attempted to do. In *Mumma* v. *The Potomac Company*, 33 U. S. 281, decided in 1834, this Court held that a judgment entered in 1818 against the corporate defendant could not be enforced in 1828, the defendant having surrendered its corporate charter in accordance with state law during the interval. The Court said at page 285:

> "* * * there is no pretence to say, that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man."

And at page 287 it was said:

> "A corporation, by the very terms and nature of its political existence, is subject to dissolution by a sur-

render of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter."

In *Oklahoma Gas Co.* v. *Oklahoma,* 273 U. S. 257, the same holding was made. There a motion had been made to substitute as appellant a new corporation which had succeeded to the property and obligations of the corporation to which the writs of error had been allowed. The original corporation had been dissolved by decree of an Oklahoma court. The motion was denied; this Court holding that the dissolution of a corporation could not be distinguished, in effect, from the death of a natural person. It was said at page 259:

"But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being."

On this point see also: *Oregon Railway Co.* v *.Oregonian Ry. Co.,* 130 U. S. 1, 20; *Head* v. *Providence Insurance Co.,* 2 Cranch, 127, 167; *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659, 667; *Scovill* v. *Thayer,* 105 U. S. 143, 148; *McCormick* v. *Market Bank,* 165 U. S. 538, 550.

Respondent was organized on April 10, 1929, under the provisions of an act of the Legislature of the State of Illinois known as the General Corporation Act of 1919 (Smith-

Hurd Ill. Rev. Stats. 1929, Chap. 32). Section 6 of said Act provided:

> "Each corporation organized under this Act shall, subject to the conditions and limitations prescribed by this Act, have the following powers, rights and privileges:
>
> • • • • •
>
> (13) to cease doing business and to surrender its charter."

Section 76 of said Act provided:

> "Any corporation which has ceased to do business as a corporation, or has discontinued to exercise its corporate functions, shall thereby forfeit its charter. The Attorney General shall proceed by information in equity to declare such forfeiture."

Section 118 of said Act provided:

> "In the case any corporation, required herein to pay a franchise tax, shall fail, neglect or refuse to file its annual report, as required by this Act, or shall fail, neglect or refuse to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable, the Attorney General shall file an information in equity against such corporation, either in the Circuit Court of Sangamon County or the Circuit Court of such other county in the State as to the Attorney General may seem best for the dissolution of a domestic corporation for abandonment and non-user of its charter."

The Act prescribed the method by which the Attorney General should proceed to dissolve corporations delinquent in the filing of reports or the payment of franchise taxes and provided (Sec. 123):

> "In case the court shall decree a dissolution of such corporation, or shall enjoin a foreign corporation from further transacting business in this State, the clerk shall certify such fact to the Secretary of State. Upon the filing of such certificate such dissolution shall be complete."

Respondent was also subject to an Act of the Legislature

of Illinois, adopted in 1895, providing that any corporation organized under general or special law, which "has ceased to do business as a corporation or has discontinued the exercise of corporate functions", shall be deemed to have "abandoned its corporate franchises" and might be dissolved at the instance of the Attorney General in proceedings substantially identical with those provided for by the 1919 Act (Smith-Hurd Ill. Rev. Stats. Chap. 32, Sec. 190 197). The Act of 1895 also provided (Sec. 7, Smith-Hurd Ill. Rev. Stats. Chap. 32, Sec. 196):

> "Upon the hearing of the information the court may decree a dissolution of such corporation, and upon notice by the Attorney General in writing of such decree being filed with the Secretary of State and entered upon the records of his office, the dissolution of such corporation shall be complete."

Proceeding under both the 1895 Act and the General Corporation Act of 1919, the Attorney General of the State of Illinois filed an information in the nature of a bill in equity in the Superior Court of Cook County for the dissolution of respondent. Notice of the suit as required by these Acts was given respondent, but it did not appear or answer the information (R. 51-52).

On May 22, 1931, the Superior Court of Cook County entered its decree (R. 51 *et seq.*) defaulting respondent and ordering "that said bill be taken as confessed against the said Forty-One Thirty-Six Wilcox Building Corporation." The decree found (R. 53) that respondent and its directors had ceased to transact business as a corporation, had discontinued the exercise of corporate functions and had failed to file annual reports and pay fees and taxes as required by statute. The decree further found that respondent had been certified by the Secretary of State to the Attorney General for failure to pay taxes and file annual reports as required by statute, the certification being for the purpose of instituting proceedings for dissolution of respondent (R. 53).

The court decreed that respondent "be, and the same is hereby dissolved, and that the charter and authority of said corporation be, and the same is hereby declared to be null and void and of no force and effect whatever, and that said defendant pay the cost of this suit, and that the clerk of this court certify the fact of such dissolution to the Secretary of State of Illinois." (R. 53). On June 26, 1931, a copy of the Decree of Dissolution certified by the Clerk of the Superior Court of Cook County was filed in the office of the Secretary of State of Illinois, as required by the statute then in force (R. 54-55).

The settled rule in Illinois is that in the absence of statutory prolongation, a decree of dissolution absolutely terminates corporate entity and capacity. In *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 348, the court said (p. 350) that

> "* * * where a corporation surrenders its charter, or where it ceases to exist by the efflux of time, or where its charter is declared forfeited by a judicial tribunal of competent jurisdiction, it can neither sue nor be sued, although the obligation of its contracts survive, and may be enforced against any property that belonged to the corporation which has not passed into the hands of *bona fide* purchasers."

To the same effect are the cases of *Life Association of America* v. *Fassett*, 102 Ill. 315, 325, and *American Exchange Bank* v. *Mitchell*, 179 Ill. App. 612, 615.

The General Corporation Act of Illinois under which respondent was organized, became effective July 1, 1919. The applicable provisions of that Act, which remained in effect for more than two years after respondent's dissolution*, were as follows (Smith-Hurd Ill. Rev. Stats. 1929, Ch. 32, Sec. 14, 79):

"§ 14. All corporations organized under the laws

* The present Business Corporation Act of the State of Illinois became effective July 13, 1933 (Ill. State Bar. Ass'n., Ill. Rev. Stats. 1937, Ch. 32).

of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

"§ 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

The effect of these sections, as construed by the courts of Illinois, was that upon the entry of a decree of dissolution, a corporation ceased to exist as a legal entity, except to the extent that its capacity was continued for a limited time for the specific purposes set forth in Section 14. By Section 79, creditors were required to pursue their remedies against the corporation by bringing suit and obtaining the service of process within the prescribed period. After the expiration of two years, the legal existence and the corporate powers of the dissolved corporation were extinguished, and thereafter no action could be commenced by or against it.*

Thus, in *Dukes* v. *Harrison & Reidy*, 270 Ill. App. 372, a creditor obtained a judgment against a corporation which was subsequently dissolved. More than two years after dissolution the creditor filed a bill in equity to enforce the liability of stockholders for unpaid subscriptions. The dissolved corporation, which by the statute was a necessary party, filed a special appearance and moved to quash serv-

* The only exception to this general statement which need be noted is that when the corporation had begun the prosecution or defense of a suit, or creditors had commenced action, within the two-year period, corporate capacity to sue or defend was continued for the purpose of that suit alone.

ice and to dismiss the suit on the ground that it had been dissolved more than two years prior to the service of summons; that by reason thereof, it had no corporate capacity for any purpose and could not be brought within the jurisdiction of the court by the delivery of a summons to one of its former officers. The court approved this contention, saying at page 382:

> "Section 53 of the Corporation Act [upon which complainant relied as authority for the bringing of the suit] must be construed with sections 14 and 79 of the same act, and it is apparent that complainant cannot avail herself of the remedy provided by this statute for the reason that her bill of complaint was not filed until September 14, 1931, which was more than two years after the dissolution of the corporation.
>
> "The attempted service of summons on the defendant corporation did not confer jurisdiction on the court and the motion to quash the service of the summons and to dismiss Harrison & Reidy, a corporation, as a party defendant should have been allowed."

In a similar case, *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405, the same interpretation was placed upon the Illinois law. A bill in equity was filed by a creditor against a corporation and its directors and stockholders, more than two years after dissolution of the corporation, to enforce a statutory liability for unpaid stock subscriptions, and a claimed liability of the directors for assenting to an indebtedness in excess of the corporate stock of the corporation. The court held that the summons issued in the case was ineffective and that the bill was properly dismissed for want of equity. It said at page 411:

> "The right to maintain this action is wholly statutory, and must be exercised within the statutory time fixed by the legislature, but for this provision the complainant could not maintain an action for relief such as prayed for in the bill. The present bill of complaint was not filed within the time provided for by sec. 79 of the Corporation Act, and sec. 2 of chap. 83 of the Statute of Limitations does not apply, *Dukes* v. *Harri-*

> *son & Reidy,* 270 Ill. App. 372, and the court properly sustained the demurrer of the defendant J. R. Troutman."

The provisions of the Illinois statute were also considered by the United States Court of Claims in *Charles A. Zahn Co.* v. *United States,* 6 Fed. Supp. 317, where it was held (p. 319) that two years after dissolution an Illinois corporation "ceased to exist" and was incapable of commencing a suit. In *A. J. Bates Co.* v. *United States,* 3 Fed. Supp. 245, the same court held that a waiver of the statute of limitations executed on behalf of a corporation by its former officers more than two years after dissolution, was void. The court said (page 248):

> "From and after that date [two years after dissolution] the Illinois corporation was extinct for all purposes. It was as nonexistent as if it had never been created, had no stockholders or officers, and was incapable of transacting any business whatsoever."

Respondent has cited two decisions of the Supreme Court of Illinois claimed to establish a contrary principle. In the first case, *Life Association of America* v. *Fassett,* 102 Ill. 315 (1882), an Illinois creditor commenced an attachment proceeding in an Illinois court, against the Illinois property of a Missouri insurance company doing business in Illinois. Thereafter the insurance corporation was dissolved by the decree of a court of Missouri; and the receiver appointed in that proceeding pleaded the dissolution in abatement of the Illinois attachment case. The Supreme Court of Illinois held (p. 324) that a prior attachment lien could not be displaced by subsequent dissolution, and that since the then law of Illinois provided for the administration of the property of dissolved corporations and extended their corporate life two years after dissolution for that express purpose, the provisions of that law should be applied to foreign corporations doing business in Illinois. Thus, the court did

no more than apply the Illinois law to a dissolved Missouri corporation doing business in Illinois, as an answer to the claim that the dissolution of that corporation created a complete defense to a previously existing suit. The court also pointed out (pp. 328, 329) that the decree of dissolution entered in the Missouri court contemplated the further existence of the corporation for the purpose of settling its affairs, and (p. 329, 330) that if the corporation was entirely defunct, it had no ability to bring the case to the Supreme Court.

In the second case, *Singer & Talcott Co.* v. *Hutchinson*, 176 Ill. 48 (1898), a suit was commenced against an Illinois corporation within two years after its dissolution, as permitted by the then Illinois statute, but there was no final judgment in the case until after the expiration of that period. The corporation then sued out a writ of error to reverse this judgment, and it was objected that the writ could not be maintained, because under the common law conception a writ of error was a new suit and as such was barred by the two-year limitation. The Illinois Corporation Act as it then existed did not limit to two years the time for bringing suits *against* a dissolved corporation, and the Practice Act then in force authorized any "party" to litigation to prosecute a writ of error to review a judgment against it. After referring to the statute as it then was, the court said at pages 52 and 53:

> "These sections, therefore, continued its life, for the respective periods stated, as an entity, so that it could sue or be sued *as a party* to the action, and therefore its rights, *as such party*, are conserved the same as the rights of other parties to actions, not only by the constitution, but by sections 67 and 90 of the Practice act, which provide *that a party* to an action may prosecute a writ of error, or, as expressed in section 90, '*any party* to such cause shall be permitted to remove the same to the Supreme Court by appeal or writ of error.' Clearly, this corporation was a party to the cause and

> came within the provisions of this law. It is conceded the corporation would have had the right to *appeal* from the judgment, because, as stated, the appeal would have been a continuation of the same suit. But the constitution and the statute grant the right to remove the record to 'any party to such cause' by writ of error as well as by appeal. For this purpose the entity of this corporation, as a party to the cause, continued after the judgment was rendered as well as before. A writ of error is a writ of right, both by the common law and our statute, as to any one who is a party to the record or who is shown by the record to be prejudiced by the judgment. (*McIntyre* v. *Sholty*, 139 Ill. 171.) This corporation was kept alive for the purpose of being made such a party to the original action, and, being so alive for such purpose, is preserved by the Practice act with authority to prosecute an appeal or a writ of error.''

This Court has also passed upon the rights and obligations of corporations dissolved under the Illinois statutes in effect prior to 1919. In *Ewen* v. *American Fidelity Company*, 261 U. S. 322, the defense made was the dissolution of the Illinois Surety Company, an Illinois corporation, under the statute then in effect. It was held that under the Illinois statute then in effect, the dissolution did not have the effect of barring a suit to recover upon a liability previously incurred.

The *Fassett case, supra*, the *Hutchinson case, supra*, and the *Ewen case, supra*, were all decided under statutes in effect prior to the enactment of the 1919 statute, under which respondent was disqualified from exercising its corporate functions. They were actions which arose at a time when under Illinois law, suits *against* a dissolved Illinois corporation were not limited to two years, but were controlled by the general Statute of Limitations. We again point out that not only is the present proceeding a voluntary petition by respondent, but the two-year limitation of the Act of 1919, under which respondent was created and dissolved, applied both to suits *by* and *against* it.

In each of the three cases the court recognized and applied the provisions of the statutes then in effect, and that is all we claim should be done here. The decisions under the statute in effect when respondent was dissolved, are uniform in holding that the lapse of two years after dissolution of a corporation destroys its legal capacity to act as a corporation.

Nor can there be any merit in a contention that the pendency of the foreclosure actions in the state court extended the life of respondent so that it might invoke the aid of the bankruptcy court for the purpose of reorganizing its business and affairs. The foreclosure actions were commenced within two years after respondent's dissolution, and in the exercise of a right granted by the Illinois statute, and under that statute and the decisions cited, could be prosecuted to decree after the two years had expired. Respondent existed after the lapse of two years only for the purpose of defending those actions, and its powers incidental to such a qualified existence were limited to the presentation of defenses in those particular cases. Certainly the pendency of those proceedings *in rem* for the enforcement of mortgage liens against specific property did not generate in respondent a continued corporate life enabling it to proceed in a different tribunal with a view to corporate reorganization. Unless this is so, the existence of a dissolved corporation might be continued indefinitely and for all purposes merely by the pendency of a suit begun within the prescribed time; and the purpose and effect of the Illinois law would be entirely defeated through the exercise of a right granted by the law itself.

(b) *Under the language of the Bankruptcy Act, the termination of respondent's corporate life under the Illinois statutes, and the lapse of two years thereafter, rendered respondent incapable of filing a voluntary petition for reorganization.*

The Bankruptcy Act contains no provision purporting to modify the rule that a corporation, dissolved in accordance with the laws of the State of its creation, has no legal existence except as permitted by the laws of that State; and no reason is apparent why an exception should be made permitting a dissolved corporation to file a voluntary petition for reorganization under Section 77B of that Act. (11 U. S. C. A. Sec. 207; 48 Stat. L. 912, as amended.)

Section 77B authorizes "any corporation, which could become a bankrupt under Section 4 of this Act" to file an original petition. Section 4 extends the right of voluntary bankruptcy to "any person." (11 U. S. C. § 22). "Person" is defined by Section 1 (19) to include "corporations": and by Section 1 (6) the term "corporations" means "all bodies having any powers and privileges of private corporations not possessed by individuals and partnerships." (11 U. S. C. § 1). It seems clear that to take advantage of the Bankruptcy Act, a corporation must have powers and privileges and not be one whose entity has been extinguished and whose powers have been revoked by force of the law to which it owed its existence.

Under the language of Section 77B it is equally clear that only an existent corporation can take advantage of its provisions. Thus, the petition must allege the "nature of the business of the debtor" and "that it desires to effect a plan of reorganization." The petition must be filed in the territorial jurisdiction in which, during the preceding six months, the corporation "has had its principal place of business or its principal assets, or in any territorial

jurisdiction in the State in which it was incorporated." During the pendency of the proceedings the court approving the petition shall "have exclusive jurisdiction of the debtor." (§ 77B (a)). A plan of reorganization adopted in any such proceeding may provide for "the issuance of new securities, (§ 77B (b) 1), "may include provisions modifying or altering the rights of stockholders, or any class of them, either through the issuance of new securities of any character, or otherwise" (§ 77B (b) 2); "may otherwise in accordance with the provisions of the section, adjust the rights, and interest of creditors and stockholders and provide for a transfer of property to another corporation" (§ 77B (b) 9).

After approving the petition or answer, the District Court and the district judge "may temporarily continue the debtor in possession * * * and shall require the debtor in possession * * * to give such notice as the order may direct to creditors and stockholders * * *" of a hearing on the order (§ 77B (c) 1). The court may authorize the debtor "* * * to issue certificates for cash, property or other consideration * * *" (§ 77B (c) 3); may "require the debtor * * * to file such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs * * *" (§ 77B (c) 4); and may permit the debtor to continue in possession of its property and operate its business (§ 77B (c)).

The judge shall confirm a plan if satisfied "that the debtor * * * is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to take all action necessary to carry out the plan" (§ 77B (f) (7)); "* * * upon final confirmation of the plan by the judge, the debtor * * * shall have full power and authority and shall put into effect and carry out the plan * * *"; and "the court may direct * * * the debtor

* * * to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees as may be required by the plan" (§ 77B (h)).

We submit that these and other provisions requiring continuous activity and full capacity during administration and reorganization cannot be reconciled with the present holding that respondent, deprived of all corporate powers, except the right to defend pending litigation, and civilly dead, is a "corporation" which can become a debtor by voluntary petition. Section 77B was intended to prevent the liquidation and winding up of an insolvent corporation, and to furnish a means for its rehabilitation by providing machinery for the adjustment of its obligations and the reorganization of its affairs.* *City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433, 438. But it is obvious that before there can be such a rehabilitation, there must be something to rehabilitate.

All of respondent's acts in the proceeding have been based upon the assumption that its corporate powers have continued to exist, notwithstanding its dissolution in May, 1931. It has undertaken to adopt resolutions authorizing the filing of the petition; acquire the certificate of sale; employ attorneys; file the petition; and appear and defend this suit. In its petition for reorganization filed in the District Court, respondent alleged (R. 2, 5):

> "(1) The debtor is a corporation organized and existing under the laws of the State of Illinois. * * *

---

* The following language of the Committee of the Judiciary of the House of Representatives, in reporting Section 77B for passage indicates that it was intended that the section would apply only to an existing corporation possessed of a charter:

> "(3) The bill permits the debtor corporation to be the final reorganized corporation. This was done in the Phipps case. The charter of a corporation costs money and is an asset which should if possible be preserved for the benefit of the creditors and stockholders. Its charter would no doubt have to be amended where the plan provided for a composition rather than for an extension. The means specified in subdivision (b) for carrying out a plan includes as one of the means the amendment of the charter of the debtor." House Report No. 194, 73d Congress, 1st Session, to accompany H. R. 5884. (P. 1)

(3) That the debtor is a corporation engaged in the business of owning, leasing, operating, controlling and managing one building and the site wherein said building is situated.

(13) That petitioner is unable to meet its debts as they mature and that it desires to effect a plan of reorganization, pursuant to Section 77B of the Bankruptcy Act."

In the petition filed June 21, 1935, it requested (R. 8):

"* * * that an order may be entered directing the Metropolitan Trust Co. to turn over said property to your petitioner * * * for the purpose of managing and supervising said property. * * *"

Notwithstanding the undoubted fact that respondent was required to have a corporate existence sufficient to enable it to file a voluntary petition under Section 77B of the Bankruptcy Act, and the equally certain fact that it did not and does not have that existence, the Court of Appeals has held in this case that respondent had capacity to file such a petition more than four years after the entry of the dissolution decree, and more than two years after respondent's statutory authority to initiate any suit had ended. Such a conclusion cannot be reconciled with the language of the Bankruptcy law.

(c) *The Illinois statute relating to dissolution, and the decree rendered thereunder, do not conflict with the Bankruptcy Act; and recognition of respondent's legal extinction does not impair the jurisdiction of the bankruptcy court. Nor were the mortgage foreclosure proceedings in the State court liquidation proceedings which the Bankruptcy Act would supersede.*

No contention has been made that the Illinois statute relating to the dissolution of corporations conflicts in terms with any provision of the Bankruptcy Act, or attempts to deny any right expressly conferred on a dissolved corporation by that Act. On the contrary, as we

have shown, the Bankruptcy Act, especially Section 77B, clearly contemplates that a debtor corporation invoking its aid must enjoy a complete and present existence under state law.

The opinion of the Court of Appeals is apparently based on the proposition that the proceedings against respondent in the Illinois courts were in the nature of insolvency proceedings, and that since the Federal power over bankruptcy was supreme, the Bankruptcy Act rendered the Illinois statutes and the decree of dissolution inoperative. This basis of the decision is indicated in the following excerpt from the opinion (R. 111):

> "Jurisdiction in bankruptcy under the federal constitution comes into existence, we take it, simultaneously with the coming into existence of insolvency of the debtor. Over his acts, in marshalling and liquidating his assets, in disposing of his property, the bankruptcy power promptly extends its arms. Consequently, though a corporation may be a creature of a state, that state having created it and given it the right to exist and to make debts, charged with knowledge of this bankruptcy power, may not so frame its laws as to bring about a situation where the jurisdiction of the federal courts to administer an insolvent estate is defeated. Having given the corporation existence, it may not take away this life to defeat the working of the bankruptcy law. Until its estate has been administered, liquidated, composed or reorganized in compliance with the bankruptcy act, the jurisdiction of the bankruptcy court continues." (R. 111).

This view of the court is based upon a misconception of the nature of the Illinois statute and its effect upon the jurisdiction of the bankruptcy courts. Sections 14 and 79 of the Illinois Corporation Act were in no sense part of an insolvency law, intended to furnish a means to an insolvent debtor or its creditors for marshalling assets, adjusting claims and ultimately discharging the debtor from its obligations. They were no more than provisions by

which the sovereign limited the life and power of a body corporate which it had created. The statute did not relate to the liquidation of the affairs of a dissolved corporation. Indeed, dissolution under the Illinois statutes is not related to insolvency. (Compare *International Shoe Co.* v. *Pincus,* 278 U. S. 261; *Stellwagen* v. *Clum,* 245 U. S. 605, 613.) Under the Illinois law, a corporation might be dissolved even though it was prosperous financially. The dissolution might follow upon the lapse of the period for which the corporation was created.

Nor were the foreclosure proceedings against respondent in the state courts related in any way to the liquidation of respondent's assets, as suggested by the Court of Appeals (R. 110, 111). They were proceedings authorized by State law to enforce a mortgage lien upon specific property. Any other property of respondent was not affected thereby. If the proceedings produced a larger sum than was required to satisfy the mortgage debt, the surplus would be paid to respondent, and would not be held by the receiver in the foreclosure proceedings for the benefit of other creditors of respondent.

Nor is the conclusion different because all of respondent's property was subject to the mortgages, for the legal status and effect of a mortgage foreclosure cannot depend upon an accident in fact. If it were otherwise, two foreclosures similar in form and effect might have a different legal status because one defendant had property free from the mortgage lien and the other defendant had none. In *Duparquet* v. *Evans,* 297 U. S. 216, this court said at page 221:

> "A receivership in a foreclosure suit is limited and special. The rents and profits are impounded for the benefit of a particular mortgagee, to be applied upon the debt in the event of a deficiency. (Citing cases) The corporation retains its other property, if it has any, unaffected in its power of disposition by the de-

> cree of sequestration. The creditors retain their remedies except against the income subjected to the lien. There is neither winding up of the business nor attempt to reorganize it and set it going anew."

In accordance with the foregoing, this Court held in the case cited, that a mortgage foreclosure receivership was not an "equity receivership" within the meaning of Section 77B of the Bankruptcy Act. The decision is apposite here, for in this case as in the case cited, all assets of the mortgagor were pledged under the mortgage.

A similar holding was made in *Straton v. New*, 283 U. S. 318, where this Court held that statute of West Virginia, providing a method for the enforcement of liens, including the liens of mortgages, was not an insolvency statute, and that proceedings thereunder were not insolvency proceedings. This Court said at page 329:

> "The act is in no sense an insolvency statute, and a proceeding thereunder is not therefore avoided by the adjudication of the debtor as a bankrupt. On the contrary, it is a mere proceeding to enforce a valid lien or liens against the real estate bound thereby * * *."

The effect of the decision of the Court of Appeals in this case is to set aside the Illinois statute relating to the dissolution of corporations, and render it entirely ineffective, on the theory that its operation is incompatible with the operation of the Bankruptcy Act. The Court of Appeals has also extended the operation of the Bankruptcy Act in such a fashion as to supersede valid proceedings under state law to foreclose mortgages, upon the assumption that such proceedings are liquidation proceedings; the assumption being contrary to fact and law.

Recognition of the fact of respondent's dissolution would not defeat the jurisdiction of federal courts to administer the affairs of an insolvent corporation. The law of Illinois provided a reasonable time (two years) for winding up

the affairs of a dissolved corporation and during that time respondent (or its creditors) could have applied to the bankruptcy court for relief if the requisite jurisdictional facts had been present. Respondent did not attempt to wind up its affairs within the statutory period, and it offers no excuse for its neglect or refusal to comply with the statute. On the contrary, it claims a continued existence derived from the state, and at the same time it ignores the forfeiture of that right by the same authority.

The decision here in question, by holding that the dissolution decree is not binding upon a bankruptcy court, in effect extends the life of a body corporate contrary to the law of the sovereign state, and creates a "legal ghost" which may exercise corporate powers and yet be immune from process, taxes and other responsibilities. By extending the application of the Bankruptcy Act to mortgage foreclosure proceedings in State courts, without more, it has given the Act a wider application than is warranted. The construction adopted by the Circuit Court of Appeals is not only contrary to the language and intention of Section 77B but casts doubt upon the constitutionality of that section. In *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U. S. 315, this Court said (page 337):

> "How they [savings and loan associations] shall be formed, how maintained, how supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred."

(d) *The decision in the case at bar is in conflict with the decisions of other courts.*

The decision of the Court of Appeals in the instant case is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Vassar Foundry Co.* v. *Whit-*

ing Corporation, 2 F. (2d) 240, in which it was held that a dissolved Michigan corporation had no authority to file a voluntary petition in bankruptcy ten months after it was dissolved by the entry of a decree in the State court. The dissolution decree had been entered, under the authority of applicable state statutes, and the court had appointed a receiver to take possession of all the assets and proceed with liquidation.

Ten months after entry of the decree, the corporation, pursuant to a resolution of the same directors, filed a voluntary petition in bankruptcy in the District Court for the Eastern District of Michigan, and adjudication followed. Thereafter, upon petition of certain creditors, the order of adjudication was vacated (*In re Vassar Foundry Co.*, 293 Fed. 248), on the ground that the dissolved corporation was non-existent and hence without legal power to file a voluntary petition in bankruptcy. This order of the District Court was affirmed by the Court of Appeals for the Sixth Circuit (2 Fed. (2) 240). In its opinion the court said (pp. 240, 241):

> "Other statutes contemplate that a corporation continues in being for certain purposes even after its corporate life expires, and it has been held that dissolution proceedings under a state statute did not necessarily bar bankruptcy proceedings (*Scheuer* v. *Smith Co.*, (C. C. A. 5) 112 F. 407, 50 C. C. A. 312). But the Supreme Court of Michigan construing these sections 13563-13570, has held that a corporation dissolved thereunder was so completely nonexistent that no suit could be maintained against it. *Jacobs* v. *Bement's Sons*, 161 Mich. 416, 126 N. W. 1043. Of course, this decision as to the construction and the effect of a statute must be accepted as obligatory upon the federal courts."

The court thus gave full effect to the Michigan laws in passing upon the question of the Vassar Company's right to file the petition; and held that since under Michigan law,

it had no power to perform any corporate act, it had no power to file the petition. In the case at bar, the Court of Appeals has sustained the corporate power and ability of respondent to file such a petition, although it must be conceded that under the law of Illinois, respondent is non-existent as a corporation; and to reach this conclusion the court has, in effect, wholly nullified the State law.

The Court of Appeals for the Sixth Circuit in the *Vassar* case gave effect to the principle announced in *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28, and in the *Vassar* case, where this Court said (pp. 42, 43):

> "The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that state mean we must accept them to mean * * *."

On the contrary, the Court of Appeals has said in this case that what the Illinois courts have said with respect to Illinois statutes is of no effect; and that the laws of Illinois relating to Illinois corporations are to be given no effect.

In the opinion of the Court of Appeals in the case at bar, it is said (86 F. (2d) 667, 669, R. 110):

> "* * * it is the settled law of this court that the corporation, thus dissolved, exists for the purpose of having 'its estate administered in a court of bankruptcy' in a proceeding 'to all intents and purposes, voluntary in character.'"

In support of this declaration, the opinion cites two decisions in the case of *In re* 211 *East Delaware Place Bldg. Corporation,* as reported in 76 F. (2d) 834 (C. C. A. 7), and in 14 Fed. Supp. 96 (D. C. N. D. Ill.). The first was a decision by the Court of Appeals for the Seventh Circuit; the second was by Circuit Judge Evans, the writer of the first opinion, while afterwards sitting on the case in the District Court.

Neither decision justifies the above quoted general statement respecting the "settled law" in the Seventh Circuit. It is true that 211 *East Delaware Place Bldg. Corporation* was an Illinois corporation and had been organized and dissolved under the same statutory provisions as the respondent here had been; but at this point all similarity ceases: The petition for reorganization in the *In re* 211 *East Delaware Place Bldg. Corporation* case was a creditors' petition; the question of the capacity of the corporation itself to file a petition was not involved. Moreover, the creditors' petition in that case was filed within ten days after the expiration of the two-year period following the entry of the dissolution decree, and charged, as an act of bankruptcy, the appointment of a receiver of the corporation in an equity proceeding, presumably before the two-year period had expired although that fact does not appear in either opinion.

In his subsequent decision in the *In re* 211 *East Delaware Bldg. Corporation case,* 14 Fed. Supp. 96, Circuit Judge Evans, who had written the opinion in the Court of Appeals, specifically recognized the difference in the effect of corporate dissolution upon the right of creditors to proceed against the debtor in bankruptcy, and upon the capacity of such a corporation to file a voluntary petition. On this subject, he said (p. 100):

> "The Circuit Court of Appeals of this circuit has held in Re 211 East Delaware Place Building Corporation, 76 F. (2d) 834, that the forfeiture of the charter of the corporation did not prevent the creditors from proceeding against the debtor in the court of bankruptcy. The only effect which this loss of corporate existence may have upon a bankruptcy proceeding is in respect to the inability of the corporation to admit acts of bankruptcy or state of insolvency or to file a voluntary petition."

From the foregoing it is, we submit, evident that the decision of the Court of Appeals in the instant case is based

on a misconception of the effect of its former decisions. In *Old Fort Improvement Co.* v. *Lea,* 89 Fed. (2) 286, the Circuit Court of Appeals for the Fourth Circuit cited the *Vassar Foundry Co. case,* 2 Fed. (2) 240, and *In re 211 East Delaware Place Bldg. Corporation,* 14 Fed. Supp. 96, in support of the statement (p. 289) that under certain conditions, "the filing of a petition in bankruptcy by a corporation is a corporate act which under state statutes can ordinarily be performed only by an existing body." Had this been the ruling in the case at bar, respondent's petition under Section 77B of the Bankruptcy Act would not have been accepted.

In re Munger Vehicle Tire Co., 159 Fed. 901 (C. C. A. 2nd Cir.), the only other case cited to support the opinion in the present case, involved an involuntary petition by creditors filed against a dissolved New Jersey corporation within four months after the commission of an act of bankruptcy. The decision of the court was rested squarely on the proposition that since the statutes of New Jersey, as construed by the State's highest court, continued the life of a corporation dissolved under those statutes, it could properly be adjudicated bankrupt in an involuntary proceeding. The court said (p. 904):

> "We are dealing with a New Jersey corporation, whose status is regulated by New Jersey statutes, and when such statutes have been construed by the highest court of New Jersey the federal courts will adopt the same construction."

The court then reviewed the New Jersey statutes, and referring to the construction placed upon them by the New Jersey courts, said at page 905:

> "Upon such construction the proclamation of default, etc., in the case at bar, did not work such a destruction of the corporation that it could not be adjudicated a bankrupt."

It is plain, that instead of supporting the decision of the Court of Appeals in the case at bar, the case cited

supports the proposition that courts of bankruptcy, as well as other federal courts, are obligated to accept the construction by the highest court of a State of that State's laws governing the dissolution of corporations created under its authority. The decision thus, impliedly at least, denies that the Bankruptcy Act supersedes or nullifies such statutes or dissolution proceedings thereunder. Our contention in the case at bar is that the Court of Appeals should have had the same regard for the Illinois law as was given to the New Jersey law in the *Munger* case. Had that course been followed, it would have been held that respondent had no capacity to file its petition.

Decisions of Circuit Courts of Appeal, other than those previously discussed, which have held that a dissolved corporation can be a party to a proceeding under the Bankruptcy Act, include *Hammond* v. *Lyon Realty Co.*, 59 F. (2d) 592 (C. C. A. 4th Cir.); *Austin* v. *Thomas*, 78 F. (2d) 602 (C. C. A. 6th Cir.); and *Old Fort Improvement Co.* v. *Lea*, 89 F. (2d) 286 (C. C. A. 4th Cir.); *Sheuer* v. *Smith & Montgomery Book & Stationery Co.*, 112 Fed. 407 (C. C. A. 5th Cir.); *Cresson & Clearfield Coal & Coke Co.* v. *Stauffer*, 148 Fed. 981 (C. C. A. 3rd Cir.); *White Mountain Paper Co.* v. *Morse & Co.*, 127 Fed. 643 (C. C. A. 1st Cir.). Even if the conclusions reached in these cases are accepted as correct, the cases themselves are distinguishable from the case at bar, in that the proceedings were either involuntary in character and based upon an act of bankruptcy committed in the preceding four months, or the state dissolution statutes were held to have continued the life of the corporation so as to authorize the filing of a voluntary petition.

A bankruptcy proceeding initiated by creditors of a dissolved corporation ordinarily stands on a distinct footing, so far as the effect of the dissolution is concerned. There, jurisdiction is predicated on the commission of an act of bankruptcy within four months before the filing of the petition (11 U. S. C. § 21), and before dissolution had be-

come final. The corporate capacity of the bankrupt, at the time the bankruptcy petition is filed, is not in that case a material element. It is also true that a dissolved corporation may have capacity to file a *voluntary* petition in bankruptcy, provided the period allowed by state statute for commencing suits by and against it, and for winding up its affairs, if such period is a limited one, has not expired.

Thus, *Hammond* v. *Lyon Realty Co.*, 59 F. (2d) 592 (C. C. A. 4th Cir.), and *Austin* v. *Thomas*, 78 F. (2d) 602 (C. C. A. 6th Cir.) involved involuntary bankruptcy petitions filed by creditors within four months after the entry of dissolution decrees; and each petition alleged an act of bankruptcy within that period. In both cases the dissolution decree had been entered in statutory proceedings in state courts for winding up corporate affairs and distributing assets.

In *Scheuer* v. *Smith & Montgomery Book & Stationery Co.*, 112 Fed. 407 (C. C. A. 5th Cir.), the state court decree dissolving the corporation was not entered until after a bankruptcy proceeding had been commenced by the filing of an involuntary petition. The dissolution decree, furthermore, was held by the court to have been procured for the express purpose of hindering and delaying creditors of the bankrupt.

Cresson & Clearfield Coal & Coke Co. v. *Stauffer*, 148 Fed. 981 (C. C. A. 3rd Cir.), was also an involuntary bankruptcy proceeding, commenced against the corporation within four months after its alleged dissolution by reason of the sale of its property and franchises upon a special execution, issued under the authority of a Pennsylvania statute. Corporate existence was held not to have been terminated by the sale.

White Mountain Paper Co. v. *Morse & Co.*, 127 Fed. 643 (C. C. A. 1st Cir.) is to the same effect.

Old Fort Improvement Co. v. *Lea*, 89 F. (2) 286 (C. C.

A. 4th Cir.) is the only decision of a Circuit Court of Appeals, except the one under review, that has come to our attention, in which a voluntary petition for corporate reorganization under Section 77B was filed by a dissolved corporation. However, the statutes of South Carolina there involved continued the dissolved corporation as a body corporate, without limitation of time, and were sufficiently broad in terms to authorize the Old Fort Improvement Co. to file its petition for corporate reorganization under Section 77B.

In *Capital Endowment Co.* v. *Kroeger,* 86 F. (2d) 976 (C. C. A. 6th Cir.), the petitioning corporation had not been dissolved, but had been ousted of its franchise in a *quo warranto* proceeding. The court upheld its right to proceed on the ground that "the fact that the debtor has been ousted from its corporate franchises in Ohio neither destroys its property nor its title thereto" (p. 979). This also was a recognition of the controlling force of the applicable State law.

II.

THE BANKRUPTCY COURT HAD NO JURISDICTION BECAUSE RESPONDENT HAD NO PROPERTY WHICH COULD BE THE SUBJECT OF REORGANIZATION UNDER SECTION 77B AND HAD NO CORPORATE CAPACITY TO ACQUIRE SUCH PROPERTY.

A distinction must be observed between a proceeding in bankruptcy which has for its object a surrender and liquidation of all of the debtor's property and his discharge from the claims of creditors, and a proceeding under Section 77B which is intended to rehabilitate the debtor by permitting him to retain his property. When discharge from debt is the object, the bankrupt need not have property, but when rehabilitation is sought, the ownership of property is essential to relief. The jurisdiction conferred upon the bankruptcy court by Section 77B would be futile

unless a debtor corporation were possessed of a property interest upon which the elaborate machinery of administration and reorganization provided for by that Section could operate. It is submitted, therefore, that it is essential to the exercise of jurisdiction under that section that the debtor have an interest in property which can be the subject of reorganization.

In determining whether the debtor has property, and the nature and extent of that property, resort must be had to the law of Illinois. *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1, 10. Under Illinois law, respondent, having failed to redeem its property from sale upon the foreclosure of mechanics' liens, had nothing but the bare possibility (subject to the first mortgage) that the certificate of sale would become void if the holder failed to take out a deed within five years (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Sec. 31).* Upon the expiration of the two-year period after dissolution, respondent became wholly incapable of owning, conveying, or otherwise dealing with this bare legal title of which it was formerly possessed. By the rule prevailing in Illinois, this title then vested, by operation of law, in respondent's stockholders, subject to the rights of those creditors who had commenced suit within the time prescribed by Sections 14 and 79 of the Corporation Act of 1919. *Gulf Lines R. R.* v. *Golconda Ry.*, 290 Ill. 384, 392; *Mining Co., et al.* v. *Mining Co.*, 116 Ill. 170, 174. But even if it could be assumed that respondent retained this bare legal title after the two years, its interest did not constitute property which could be the subject of reorganization under Section 77B.

We submit that Section 77B contemplates, as a minimum requirement, that a debtor corporation have property of a

* Title of the owner is completely and finally divested upon the issuance of the deed. (*Allison* v. *White*, 285 Ill. 311; *Sutherland* v. *Long*, 273 Ill. 309.)

kind and character that will pass to a trustee in bankruptcy. The language of the section is (77B (c) (2)):

> "* * * every such trustee, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge, and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to Section 44 of this Act, and if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, and, subject to the authorization and control of the judge, the power to operate the business of the debtor during such period, fixed or indefinite, as the judge may from time to time prescribe * * *".

A trustee appointed under Section 44 (11 U. S. C. § 72) derives his title to the property of the bankrupt by virtue of Section 70 of the Act (11 U. S. C. § 110) which provides that the trustee—

> "shall * * * be vested by operation of law with the title of the bankrupt * * *, to all * * * (5) property which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Under the law of Illinois, respondent, at the time of the filing of its petition, had no property which it could "transfer" within the meaning of this section of the Bankruptcy Act. Two years after the decree of dissolution, respondent's corporate existence ceased, and it was powerless to make a conveyance. *Wilmington Water Power Co.* v. *Evans,* 166 Ill. 548; *A. J. Bates Co.* v. *United States,* 3 Fed. Supp. 245, 248; Fletcher, Cyclopedia Corporations (Perm. Ed. 1933), Vol. 16, Chap. 65, Section 8137, P. 940; and cases cited under Point I. Nor could its interest be "levied upon and sold under judicial process", for under the holding of the Supreme Court of Illinois in *Commerce Vault Co.* v. *Barrett,* 222 Ill. 169, 175, the bare legal title remaining in

an owner after judicial sale is "not such an interest as to be subject to levy and sale under execution."

The applicability of these principles is not affected by the fact that respondent attempted to acquire the outstanding certificate of sale issued on the foreclosure of the mechanics' liens. Under the law of Illinois, respondent was incapable of accepting a conveyance or transfer after its dissolution had become absolute and it had ceased to exist as a legal entity. *Duffield* v. *Duffield,* 268 Ill. 29, 38; *A. J. Bates Co.* v. *United States,* 3 Fed. Supp. 245, 248.

Another impediment to the exercise of jurisdiction by the bankruptcy court exists. The interest of respondent in the premises, after the expiration of the redemption period, does not constitute a jurisdictional *res,* under Section 77B of the Act. The legal owner of the certificate of sale might present it at any time and obtain a deed, and under the doctrine announced in *Louisville Bank* v. *Radford,* 295 U. S. 555, the bankruptcy court could not destroy or suspend his right so to perfect his title. In these circumstances, jurisdiction cannot exist when a reorganization effected under the supervision of the court could be nullified by the issuance of a deed.

The decision of the Court of Appeals attempts to surmount these objections to jurisdiction by recognizing the validity of the transfer of the certificate of sale to respondent more than four years after its dissolution. In so doing it not only recreates an entity no longer existing but having given life to this phantom, endows it with property rights which are denied to it by the law of Illinois, thus violating a principle expressed in *In re Lowmon,* 79 F. (2d) 887, (C. C. A. 7th Cir.), where the court said at page 891:

> "We think there is nothing in the constitutional clause conferring upon Congress the control over bankruptcy which authorizes it to change property rights already created by the states. Under the proper ex-

ercise of that power, federal courts may be authorized to assume jurisdiction over and to administer property of bankrupts, but they must administer that property as they find it, and they have no power to create new rights in it for the benefit of either debtor or creditor."

The situation produced by the opinion of the Court of Appeals in this case is indeed unique. As a result of the Court's opinion, respondent is a corporation endowed with all attributes necessary to permit the functioning of the Bankruptcy Act. Its capacity to initiate proceedings in bankruptcy has been recognized and presumably, if the bankruptcy court should permit, it has the capacity to be sued. It is assumed to have the power to acquire and dispose of property which can be reorganized under the bankruptcy law and to possess a corporate franchise which enables it to manage and administer that property. Presumably its corporate organization which the Court of Appeals has held to be existent for the purposes of the petition can be reorganized under the same franchise which the State has forfeited. In fine, according to the Court of Appeals, respondent is an existing corporation having all powers which a corporation must have for reorganization purposes under Section 77B.

Notwithstanding this, it is still certainly true that under the State law, respondent has no corporate existence; has no property or property interest capable of administration, purchase or sale; has no power to acquire such property; and is immune from taxes, franchise fees, and all of the other obligations imposed by the State of Illinois upon corporations which it creates. Such a situation is anomalous in the extreme. Certainly, if respondent as a corporation is defunct in the eyes of the Illinois law, it must be defunct for all purposes; or, on the contrary, if it still has corporate existence sufficient to permit the administration of its affairs under the Bankruptcy Act, it must have a cor-

porate existence sufficient, for example, to enable the State of Illinois to collect taxes from it. Yet, we submit the State of Illinois would have considerable difficulty in collecting taxes from a corporation which in its view and under its law was no longer existent.

The situation created by the decision here in issue is intolerable from another viewpoint. A creditor of respondent proceeding in the courts of Illinois would have no rights whatever; there would be no entity against which he could recover. Yet, if the same creditor elects at any time to pursue his remedy, if any, in the bankruptcy court, jurisdiction is held to exist. The ultimate effect of the opinion of the Court of Appeals herein is to confer perpetual life upon Illinois corporations, notwithstanding the State law and proceedings thereunder; for the Court of Appeals has said (R. 110) that a dissolved corporation exists for the purpose of having its estate administered in a court of bankruptcy, apparently without limit in time.

CONCLUSION.

We submit that the decrees in these cases should be reversed for all of the reasons assigned. The opinion of the Court of Appeals finds no support in any other decided case; on the contrary, such decisions as have been made upon facts analogous to those in the case at bar support the position which we have taken. There is plainly no reason or justice in the rule of law announced by the Court of Appeals in these cases, and if that rule is the law, the unfortunate results thereof cannot now be foreseen.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
CHARLES J. CALDERINI,
GEORGE W. OTT,
Attorneys for Petitioner.

APPENDIX.

Smith-Hurd, Illinois Revised Statutes, 1929, Chapter 32:

* * * * * * *

[14. *Expiration by limitation—Closing business.*] § 14. All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity.

* * * * * * *

[79. *Dissolution—When creditors affected.*] § 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution.

* * * * * * *

Smith-Hurd, Illinois Revised Statutes, 1929, Chapter 77:

* * * * * * *

[16. *Certificate.*] § 16. When any real estate is sold by virtue of an execution, judgment, or decree of foreclosure of mortgage, or enforcement of mechanics' lien, or vendor's lien, or for the payment of money, it shall be the duty of the sheriff, master in chancery or other officer, instead of executing a deed for the premises sold, to give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor, or if purchased by the person in whose favor the execution or decree is, the amount of his bid, the time when the purchaser will be entitled to a deed, unless the premises shall be redeemed, as provided in this Act.

* * * * * * *

[18. *Redemption by defendant, etc.*] § 18. Any defendant, his heirs, administrators, assigns, or any per-

son interested in the premises, through or under the defendant, may, within twelve months from said sale, redeem the real estate so sold by paying to the purchaser thereof, his executors, administrators or assigns or to the sheriff or master in chancery, or other officer who sold the same, or his successor in office, for the benefit of such purchaser, his executors, administrators, or assigns, the sum of money for which the premises were sold or bid off, with interest thereon at the rate of six per centum per annum from the time of such sale, whereupon such sale and certificate shall be null and void.

* * * * * *

[20. *Redemption by creditor, etc.*] § 20. If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises in the following manner: Such creditor, his executors, administrators or assigns may sue out an execution upon his judgment or decree, and place the same in the hands of the sheriff or other proper officer to execute the same, who shall indorse upon the back thereof a levy of the premises desired to be redeemed; and the person desiring to make such redemption shall pay to such officer the amount for which the premises to be redeemed were sold, with interest thereon at the rate of six per centum per annum from the date of the sale, for the use of the purchaser of such premises, his executors, administrators or assigns, whereupon such officer shall make and file in the office of the recorder of the county in which the premises are situated a certificate of such redemption, and shall advertise and offer the premises for sale under said execution as in other cases of sale or execution.

* * * * * *

[31. *Deed, when and how made—Limitation.*] § 30. When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the

purpose. If the time of redemption shall have elapsed before the taking effect of this Act, a deed may be given within two years from the time this Act shall take effect. When such deed is not taken within the time limited by this Act, the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed.